

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Implementation of the )  
Telecommunications Act of 1996 )  
)  
Telemessaging, )  
Electronic Publishing, and )  
Alarm Monitoring Services )

CC Docket No. 96-152

DOCKET FILE COPY ORIGINAL

COMMENTS OF U S WEST, INC.

Kathryn Marie Krause  
John L. Traylor  
Suite 700  
1020 19th Street, N.W.  
Washington, DC 20036  
(303) 672-2859

Attorneys for  
U S WEST, INC.

Of Counsel  
Daniel L. Poole

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## SUMMARY

In these comments, U S WEST responds to the Commission's Notice of Proposed Rulemaking on the rules which should govern the non-accounting separate affiliate and non-discrimination requirements for electronic publishing, alarm monitoring services, and telemessaging.

In general, the structural separation and transactional requirements of the 1996 Act for these services are clear, unambiguous, and require little interpretation. Additional requirements which will be burdensome and costly for both the Commission and the BOCs are not necessary.

Prior to the enactment of the 1996 Act, the BOCs and their affiliates were permitted to engage in the provision of intraLATA electronic publishing services. The 1996 Act affirms their authority to do so. The 1996 Act establishes structural separation and transactional requirements for electronic publishing, including rules governing the marketing and promotion by a BOC of electronic publishing services provided by its affiliate or its electronic publishing joint venture. The joint marketing provisions should be read to apply to the provision of electronic publishing services but not to the provision of other products and services by the same affiliate. Where the 1996 Act permits a BOC to provide inbound telemarketing and referral services for its affiliate's electronic publishing service, the joint marketing provision should be read to require the BOC to offer to provide the same services on non-discriminatory terms upon request by other electronic publishers which offer an electronic publishing service which is competitive with

the BOC affiliate's service. Electronic publishers which do not compete with the BOC affiliate's service do not require the BOC's inbound telemarketing and referral assistance.

Complaint proceedings involving electronic publishing are afforded unique importance by the 1996 Act. These proceedings inherently implicate First Amendment concerns. Congress provided for the deliberate consideration of the issues by either the Commission or the federal district court, at the discretion of the complainant. The Congressional mandates surrounding complaint procedures involving electronic publishing are different from the considerations for complaint procedures for other services.

U S WEST has advised the Commission that it is providing alarm monitoring services, as defined by the 1996 Act, and that it was doing so as of November 30, 1995. The definition in the 1996 Act, and not the Commission's regulatory framework for enhanced services, controls that determination. U S WEST's two services, Scan-Alert and Versanet, are alarm monitoring services as defined by the 1996 Act.

U S WEST currently provides intraLATA telemessaging, subject to the Commission's Computer III and ONA requirements. The 1996 Act supplants the need for those requirements to continue to apply to telemessaging. In addition, the 1996 Act does not require U S WEST to treat telemessaging as an interLATA information service until U S WEST obtains authority to provide the underlying

interLATA transmission component together with the telemessaging component as an integrated service.

The Commission's requirements adopted in this proceeding should not result in requirements which are complex, costly, or onerous, for either the Commission or the BOCs.

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COMMENTS OF U S WEST, INC.

I. INTRODUCTION

In the Notice associated with the above-captioned docket,<sup>1</sup> the Federal Communications Commission ("Commission") seeks comment on the rules which should govern the non-accounting separate affiliate and non-discrimination requirements of section 274 (electronic publishing), section 275 (alarm monitoring services), and section 260 (telemessaging) of the Telecommunications Act of 1996.<sup>2</sup> U S WEST, Inc. ("U S WEST") hereby submits its comments.

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<sup>1</sup> In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Service, CC Docket No. 96-152, Notice of Proposed Rulemaking, FCC 96-310, rel. July 18, 1996 ("Notice").

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"); Notice ¶¶ 8, 13.

U S WEST urges the Commission to conduct this proceeding consistent with the pro-competitive intent of Congress.<sup>3</sup> The Commission should be guided by the desire of Congress to expedite the trend toward full competition and less regulation. The Commission should not adopt rules which are unnecessary and which have the effect of restraining or obstructing the emergence of Bell Operating Company ("BOC") competitiveness.

The Commission should be guided by the plain language of the 1996 Act. Most of the requirements in sections 260, 274, and 275 are clear, unambiguous, and require little interpretation. The Commission should look to the plain meaning of the words used in these sections and should not read into the requirements imposed by those provisions obligations which are not required or intended by Congress.

Finally, the Commission's interpretation of the relevant statutory provisions should be educated by the temporal nature of the separation they impose. For example, as the Commission acknowledges,<sup>4</sup> in the case of electronic publishing, all of the requirements in section 274 terminate four years after enactment of the 1996 Act.<sup>5</sup> In the case of alarm monitoring services, the prohibition on BOC provisioning of alarm monitoring services terminates five years after enactment of the 1996 Act.<sup>6</sup> Therefore, the Commission should not impose separation requirements that harken

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<sup>3</sup> As the Commission has recognized, when it adopted the 1996 Act, "Congress sought to establish a 'pro-competitive, de-regulatory national policy framework' for the U.S. telecommunications industry." Notice ¶ 1.

<sup>4</sup> Id. ¶¶ 9-11.

<sup>5</sup> 1996 Act, 110 Stat. at 103 § 274(g)(2).

<sup>6</sup> Id. at 105 § 275(a)(1).



toward long-term corporate or market fixtures. Rather, it should seek -- all the while consistent with Congressional mandates -- to minimize the corporate and market impacts of any separation requirements it deems warranted. The Commission's requirements should be consistent with its stated objective "to minimize the burden of the rules,"<sup>7</sup> and it should assiduously avoid making the implementation of its requirements complex, costly, or onerous, for either the Commission or the BOCs.

## II. ELECTRONIC PUBLISHING CONSIDERATIONS (Notice ¶¶ 28-64)

### A. Corporate Organization And Operational Independence (Notice ¶¶ 47-48)

A BOC, or its affiliates, is permitted to engage in the provision of electronic publishing, disseminated by means of a BOC's or any of its affiliates' basic telephone service, through two vehicles. The engagement can occur through a separated affiliate complying with section 274(b) or through a joint venture complying with section 274(c)(2)(C).

Such engagement could also occur through other various organizational combinations. For example, a BOC may choose to offer its electronic publishing services through an affiliate that offers some portion of section 272 services (e.g., electronic publishing with interLATA information services)<sup>8</sup> or through a combined

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<sup>7</sup> Notice ¶ 9.

<sup>8</sup> Compare id. ¶ 47 ("Under the 1996 Act, therefore, BOCs must first distinguish electronic publishing services from other information services and then provide their electronic publishing services consistent with the requirements of section 274(b) and their other information services consistent with the requirements of section 272(b).").

“multi-purpose” affiliate (combining all section 272 (interLATA information services, manufacturing, and in-region interLATA services) and section 274 operations in one corporate organization). There is no statutory imperative prohibiting such a structure.

While a “multi-purpose” affiliate would be required to “operate independently” from the BOC (due to the express requirements of sections 272(b)(1) and 274(b)), the exact manner in which that affiliate is required to operate would depend upon each of the services provided by that affiliate and the statutory separation and transactional requirements associated with each service.<sup>9</sup> For example, a BOC would be permitted to perform hiring and training of personnel on behalf of the interLATA business conducted by the affiliate. However, a BOC would not be permitted to perform hiring and training of personnel on behalf of the electronic publishing business conducted by the affiliate.<sup>10</sup> The structural and transactional separation requirements of sections 272 and 274 are specific and clear.<sup>11</sup> Despite these service restrictions, a BOC might still prefer to utilize such a

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<sup>9</sup> As the Commission observes, section 274(b) lists nine structural separation and transactional requirements imposed on a section 274 operation to assure its operational independence. Id. ¶ 35.

<sup>10</sup> Section 274(b)(7)(A) prohibits a BOC from performing hiring or training of personnel on behalf of an electronic publishing affiliate. 1996 Act, 110 Stat. at 101 § 274(b)(7)(A). However, section 272(b) contains no comparable prohibition with regard to an affiliate which provides interLATA services or engages in manufacturing.

<sup>11</sup> The Commission seeks comment on whether it should adopt additional regulatory requirements beyond those identified in section 274(b) to ensure that a section 274 operation complies with the “operate independently” obligation. The answer is “no.” As U S WEST argued in response to the BOC In-Region NPRM (In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the

multi-purpose affiliate because of the “economies of scope where it is less costly to combine two or more product lines in one firm than to produce them separately.”<sup>12</sup>

Even if the Commission might have some general regulatory authority to embellish the explicit operational independence requirements for either a section 272 or 274 operation, it should not do so at this time. There should be some demonstrated necessity for additional obligations, a demonstration that can occur only in light of actual experience. Furthermore, there should be some strong public policy reason for the imposition of additional requirements, since such requirements will not be borne by a BOC without costs and losses of efficiencies. In the absence of a public interest benefit, obligations above and beyond those proscribed by the 1996 Act should not be imposed.

B.     The Joint Marketing Provisions In Section 274(c) Should  
Not Be Read Broadly In A Way That Exceeds Clear  
Congressional Intent And Depresses Constitutionally  
Protected First Amendment Speech (Notice ¶¶ 49-67)

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Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308, rel. July 18, 1996), the “operate independently” provision is a form of “summary language,” leaving to the following provisions the articulation of what, specifically, is required for a subsidiary operating under the strictures of that particular section to be found to meet the requirement. U S WEST Comments at 29-30, filed Aug. 15, 1996. This observation is buttressed by the fact that both sections 272 and 274 contain “operate independently” provisions, yet those provisions are not identical. This suggests that Congress targeted those elements it deemed critical to each type of operation in its delineation of what must be done to demonstrate operational independence.

<sup>12</sup> Notice ¶ 5, n.11. Capitalizing on a corporation's economies of scope and scale provide it a “legitimate competitive advantage[ ]” which can benefit consumers. Id. ¶ 8.

In construing section 274(c), the joint marketing provisions relevant to a section 274(b) affiliate, the Commission should focus on the context of the activities Congress meant to include in its joint marketing/referral obligations. The context is critical to any rational interpretation of the provision, as demonstrated below. Furthermore, the Commission should make clear that the restrictions of section 274(c)(1)(A) apply only to those corporate enterprises or operations actually involving electronic publishing.

1.     Section 274(c)(1)(B) Does Not Prohibit A BOC From Jointly Marketing Products And Services Offered By An Affiliate  
          Which Do Not Involve Electronic Publishing (Notice ¶ 50)

In the Notice, the Commission observes that section 274(c)(1)(B) provides that “a [BOC] shall not carry out any promotion, marketing, sales, or advertising for or in conjunction with an affiliate that is related to the provision of electronic publishing.”<sup>13</sup> The Commission seeks comment on what, precisely, is meant by this language, in light of the fact that the clause “that is related to the provision of electronic publishing” could be interpreted to modify either the phrase beginning with the word “promotion” or the word “affiliate.” If the former interpretation were adopted, a BOC would be prohibited from carrying out any promotion, marketing, sales or advertising activities related to the provision of electronic publishing with any affiliate, “regardless of the type of business in which such affiliate engaged.”<sup>14</sup> If the latter interpretation were adopted “then the affiliate prohibited . . . from

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<sup>13</sup> Id. ¶ 49.

<sup>14</sup> Id. ¶ 50.

engaging in joint marketing activities with a BOC would be one that were in some manner related to the provision of electronic publishing.”<sup>15</sup>

U S WEST supports the latter interpretation because it is more consistent with corporate organizational flexibility, something that there is no evidence Congress meant to impede. For example, as discussed immediately above, the Commission recognizes that a BOC may choose to provide electronic publishing services through a section 272 affiliate.<sup>16</sup> In such circumstances, the provisions of section 274(c)(1)(B) -- not those of section 272 -- would control the joint marketing of the BOC’s electronic publishing services. The joint marketing restrictions imposed with respect to electronic publishing services would not apply to all products and services offered by the separate “multi-purpose” entity.

This construction gives full effect to the electronic publishing joint marketing restrictions of the 1996 Act. It also provides BOCs with maximum flexibility in organizing their businesses. This construction does not penalize a BOC if, for example, it chooses to offer both electronic and non-electronic publishing products and services through a single entity or if it chooses to offer electronic publishing services and interLATA information services<sup>17</sup> or interexchange interLATA services through a single legal entity.

2. Section 274(c)(1)(A) Permits A BOC To Engage In Joint Marketing Services Offered By Its Section 274 Affiliate Which Do Not Represent Electronic Publishing (Notice ¶ 53)

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<sup>15</sup> Id.

<sup>16</sup> Id. ¶ 48.

<sup>17</sup> See Section II.A., supra.

U S WEST agrees with the Commission's conclusion that section 274(c)(1)(A) prohibits a BOC from engaging in the promotion, marketing, sale, or advertising of electronic publishing services offered by its section 274 separated affiliate.<sup>18</sup> However, that section should not be construed more broadly to prohibit a BOC from engaging in the promotion, marketing, sale, and advertising of non-electronic publishing products and services offered by its section 274 affiliate.

On its face, section 274(b) creates no impediment to a BOC's affiliate offering both electronic publishing services as well as non-electronic publishing services, as that section does not limit or restrict the services the section 274 affiliate may offer. And, as the Commission acknowledges, a BOC may choose to operate through a "multi-purpose" affiliate (see discussion above), in which case the affiliate would, by virtue of its "multi-purposes," obviously be offering services that did not constitute "electronic publishing." In such a situation, it would be irrational to conclude that all the services offered by the affiliate were contaminated by the joint marketing restrictions contained in section 274(c)(1)(A).

Should a BOC forego the creation of a full-blown "multi-purpose" affiliate, it might still create an affiliate that houses a broader range of products than only those which constitute "electronic publishing."<sup>19</sup> Those activities should not be

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<sup>18</sup> Notice ¶ 53.

<sup>19</sup> In addition to a "multi-purpose"-type affiliate, the Commission notes that a BOC might create an affiliate housing electronic publishing services and interLATA information services. Id. ¶ 48. A similar analysis would pertain to this type of affiliate, as there would clearly be two product lines involved.

encumbered by the joint marketing restrictions contained in section 274(c)(1)(A), any more than a “multi-purpose” affiliate would be. This is particularly true given the nature of the activities in which such an affiliate would predictably be engaged, i.e., speech activities protected by the First Amendment.

The non-electronic publishing products and services that might be offered from a section 274 affiliate could be expected to encompass a broad spectrum, such as the publication of all types of print materials, including all manner of books, directories, catalogues, or the provision of services specifically excluded from the definition of “electronic publishing.”<sup>20</sup> Such may include white- and yellow-page directories for the affiliated BOC in-region or in competition with white- and yellow-page directories published for other incumbent local exchange carriers in-region or out-of-region, as well as white- and yellow-page directories in foreign countries. Other print materials may include the publication of community resource directories; business directories, etc., for sale and distribution within the BOC’s service area as well as out-of-region and in foreign countries. The affiliate may choose to offer some products and services which are not related to publishing at all.

None of these non-electronic publishing products and services implicates any of the competitive concerns Congress intended to address in the section 274 requirements. There, Congress sought to circumscribe, for a limited time, joint marketing between a BOC and its section 274 affiliate offering electronic publishing services because that affiliate would use the BOC’s basic telephone service to

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<sup>20</sup> See id. ¶ 30 (discussing these services).

disseminate those services. As the Commission has acknowledged, Congress intended to restrict the BOC's ability to leverage those basic services to favor its electronic publishing services which use those basic services.<sup>21</sup> There is no indication that, absent a connection between a publishing activity and the BOC's network operations, Congress meant to impede commercial speech activities engaged in by a BOC corporate enterprise.

Moreover, a contrary interpretation would penalize the section 274 affiliate for attempting to realize operating and cost efficiencies which may exist for businesses in the publishing field,<sup>22</sup> some of which may involve electronic publishing and some of which do not. Such an interpretation would reward a less efficient business structure and would artificially compel a section 274 affiliate to engage only in the provision of electronic publishing, while mandating that another entity be created to engage exclusively in the provision of non-electronic publishing, products, and services. The disincentive for a section 274 affiliate to offer both electronic publishing and non-electronic publishing products and services would also limit the innovative development of new products and services and would raise prices to customers and consumers for all of these products and services.<sup>23</sup>

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<sup>21</sup> Id. ¶ 7.

<sup>22</sup> Id. ¶ 5, n.11 (noting that integrated firms realize such economies when offering multiple product lines).

<sup>23</sup> Id. ¶ 8 (noting that BOCs should be permitted to realize "legitimate competitive advantages" to benefit "consumers of the carriers' new services").



For all of the above reasons, the Commission should conclude that the joint marketing restrictions imposed in section 274(c)(1)(A) apply only to those activities involving electronic publishing and do not pertain to non-electronic publishing activities.

3. If A BOC Provides Inbound Telemarketing Or Referral Services To Its Electronic Publishing Affiliate Or Joint Venture, Section 274(c)(2)(A) Should Require The BOC To Make Such Services Available Only To Those Electronic Publishers Offering Comparable Electronic Publishing Offerings (Notice ¶¶ 54-55)

Section 274(c)(2)(A) creates exceptions to the joint marketing restrictions in section 274(c)(1). It permits a BOC to provide inbound telemarketing or referral services for a section 274 affiliate, electronic publishing joint venture, or affiliate related to the provision of electronic publishing, if such services are made available by the BOC to all electronic publishers on request on non-discriminatory terms.

The Commission should adopt an interpretation of section 272(c)(2)(A) consistent with the goal of the 1996 Act to expedite the development of competition. Such an interpretation would limit the non-discriminatory inbound telemarketing or referral services obligations to those services that are of "like kind." No obligation should exist for a BOC to discuss "Type A" services on a call where the caller and the BOC representative are, in fact, discussing "Type B" services. A contrary conclusion not only goes beyond any demonstrated Congressional intent but is calculated to produce customer confusion and irritation.

a. General Congressional Intent With Respect  
To Electronic Publishing Activities (Notice ¶¶ 28-31)

The Congressional concern raised by the BOCs' provision of electronic publishing involved the BOCs' supposed ability to leverage their local exchange monopoly to gain an unfair advantage in the competitive electronic publishing market. This was the same concern raised by the BOCs' provision of interLATA services and manufacturing telecommunications equipment and customer premises equipment ("CPE"). This was the fundamental concern Congress addressed by adopting section 274 for electronic publishing and section 272 for in-region interLATA services and manufacturing.

Electronic publishing is defined in section 274 not only by the character of the content but by the fact that it is disseminated by means of a BOC's or its affiliate's basic telephone service. Congress explicitly addressed the concern that a BOC could use its local exchange services to unfairly advantage its electronic publishing separated affiliate or electronic publishing joint venture. Section 274(d) compels a BOC to provide "network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate."<sup>24</sup> In addition, section 274(b) establishes structural and transactional requirements for a BOC's section 274 affiliate engaged in electronic

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<sup>24</sup> 1996 Act, 110 Stat. at 102 § 274(d).

publishing. These requirements provide demonstrable safeguards for all electronic publishers in the industry, whether they compete with each other or not. These safeguards specifically address the perceived concern associated with a BOC's entry into electronic publishing.

b.     The Inbound Telemarketing/Referral Services  
Provisions Emanate From A Different Congressional  
Intent (Notice ¶¶ 54)

The exceptions in section 274(c)(2)(A) which permit a BOC to provide inbound telemarketing and referral services for its electronic publishing affiliate or electronic publishing joint venture were designed by Congress for a different purpose. That section was designed to provide a form of comparable treatment between those services being marketed by a BOC and similar services offered by other electronic publishers. A broader reading is illogical and would only create bizarre communications between a BOC service representative and customers and engender customer confusion and irritation.

Section 274(c)(2)(A) should not be read to impose the same inbound telemarketing and referral obligations with respect to dissimilar, disparate types of electronic publishing services. The purpose is not to provide an economic benefit to non-BOC providers which do not offer a competing service. Competitive comparability should be the touchstone to implicate the BOCs' obligation in section 274(c)(2)(A) to offer to provide inbound telemarketing and referral services to other electronic publishers.

For example, if a U S WEST section 274 affiliate offered an electronic travel bureau service and if U S WEST either marketed such offering on an inbound calling basis or referred callers to the travel bureau, section 274(c)(2)(A) could be interpreted to require U S WEST to refer callers to all other electronic publishers, upon request. This requirement could include referrals to electronic publishers offering electronic services ranging from landscaping tips, stock quotes, research materials about archeological sites, etc., despite the lack of competitive comparability between any of these offerings and the electronic travel bureau offering being promoted by U S WEST. Such result is not mandated by the 1996 Act<sup>25</sup> nor should it be adopted, as it lacks any sound logical or public policy foundation.

The Commission's rules must, therefore, focus on actual competition and safeguarding the interests of electronic publishers which in fact compete with those services offered by a BOC's electronic publishing affiliate or electronic publishing joint venture.

C. Joint Marketing Employees And Customer Proprietary Network Information ("CPNI") Use (Notice ¶ 53)

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<sup>25</sup> Compare Notice ¶ 55. The Joint Explanatory Statement does not address this issue. The Committee Report which accompanied H.R. 1555 said that "a BOC may refer a customer who seeks information on an electronic publishing service to its affiliate, but must make sure that the referral service is available to unaffiliated providers." House Report on H.R. 1555 (Report No. 104-204) at 86 (emphasis added). Implicit in this comment is the notion that there is some commonality of service offering ("an electronic publishing service") between that being offered by the BOC's electronic publishing affiliate and the unaffiliated providers. And the common characteristic they share must be something more than the fact that they are both engaged in the generic provision of electronic publishing.

The Commission notes that the term “joint marketing” is not defined in the 1996 Act.<sup>26</sup> It then tentatively concludes that the term includes “making [local exchange or other BOC services together with the BOC’s electronic publishing services] available from a single source” as an activity included within such term, and thus prohibited under section 274(c).<sup>27</sup> U S WEST is not generally opposed to the Commission’s proposed definition, provided the Commission acknowledges that section 274(c)(2)(A) creates an exception that would allow the BOC to conduct inbound telemarketing and referral services for the electronic publishing services offered by its affiliate.

A similar analysis applies to section 274(b)(5)(A) which requires that a BOC and a section 274 affiliate “have no . . . employees in common.”<sup>28</sup> The Commission inquires how the “joint marketing activity” permitted by section 274(c)(2) can be accomplished in light of the common-employee prohibition.<sup>29</sup>

The provisions of section 274(c)(2)(A), being more particular and directed than that found in section 274(b)(5), must be read to permit the use of BOC employees for the express purpose of the marketing permitted by section 274(c)(2)(A). Any other reading would render section 274(c)(2)(A) totally without

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<sup>26</sup> Notice ¶ 53.

<sup>27</sup> Id. The Commission includes other activities, as well, within the term, such as advertising the availability of both types of services (presumably together) and “providing bundling discounts for the purchase” of both.

<sup>28</sup> Id. ¶ 39.

<sup>29</sup> Id. ¶ 40.

meaning and effect -- an outcome surely not consistent with reasoned Congressional intent.

Such interpretation would not render nugatory the provisions of section 274(b)(5), because the employee engaged in the marketing activity would not be a "common employee." The employee would be in the employ of the BOC, not jointly hired by the BOC and the section 274 affiliate.<sup>30</sup> While this arrangement would create a "transaction" that would need to conform to section 274(b)(3), it would not produce a situation involving "joint and common costs that would require allocation between the telephone operating company and the affiliate."<sup>31</sup> Thus, it would present no improper cost allocations, which the Commission asserts is the evil Congress meant to guard against in imposing the "no common employee" obligation, in the first instance.<sup>32</sup>

As an integral aspect of any inbound telemarketing that would occur pursuant to the authority of section 274(c)(2), BOC personnel would be accessing and using CPNI. The Commission seeks comment on "whether and to what extent . . . the [CPNI] provisions in section 222 affect the implementation of section 274."<sup>33</sup> The Commission asks a similar question with respect to section 274(c)(2)(B), which

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<sup>30</sup> The Commission describes the joint marketing section 274(c)(2) as one where the BOC and the section 274 affiliate "share marketing personnel." *Id.* ¶ 40. U S WEST would not characterize this as a "sharing" of employees. Rather, the BOC employee is operating in something of an agency capacity for the section 274 affiliate with respect to inbound telemarketing calls.

<sup>31</sup> *Id.* ¶ 14.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ¶ 53 (footnotes omitted).

allows a BOC to share “basic telephone service information” within the context of a teaming relationship.<sup>34</sup>

U S WEST is on record with the position that the CPNI provisions of the 1996 Act would permit a telecommunications carrier to share CPNI across an entire corporate enterprise, based on implied consent stemming from an existing business relationship. Alternatively, a telecommunications carrier which advises its customers as to how CPNI is used and shared within a corporate enterprise should be free to use the CPNI across all products and services of that enterprise, barring customer objection.<sup>35</sup> Thus, based on implied consent (gleaned from either the relationship or the notification), CPNI could be used by the BOC employee in the joint marketing of the section 274 affiliate’s electronic publishing offerings. Such could not necessarily be used with respect to comparable electronic publishing offerings of others, however, without further solicitation of customer consent.<sup>36</sup>

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<sup>34</sup> Id. ¶ 56.

<sup>35</sup> Section 274(c)(2)(B) actually supports U S WEST’s “corporate enterprise” analysis, in that it does not require separate customer approval to share “basic telephone information” (a term that is defined in substantially similar terms to CPNI, see section 274(i)(3)) within the context of an electronic publishing teaming arrangement. In any event, particularly with respect to a “notice and opt out model,” to the extent a telecommunications carrier disclosed the potential usage of CPNI within the context of possible teaming arrangements, and a customer had no objection, a BOC should be deemed to have whatever “approval” might be considered necessary to share the information in the context of a section 274(c)(2)(B) transaction.

<sup>36</sup> This further solicitation could be secured either as part of the original BOC notification or on the call itself, as discussed immediately below.

In all events, however, a BOC could use CPNI on an inbound telemarketing call for both telephony and electronic publishing services of the BOC and third parties, provided the customer consented to such use on the call.<sup>37</sup>

D. Section 274(b) Separation and Transactional Requirements  
(Notice ¶ 35)

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As discussed above, section 274(b) provides that an affiliate engaged in electronic publishing and an electronic publishing joint venture are to be operated independently from the BOC. As U S WEST argued above, the Commission should not add additional obligations beyond those expressly announced in the statute in light of the plain Congressional statements of the indicia of operational independence, the temporal nature of the restrictions, and the lack of any demonstrable need that a greater level of regulation is required, a demonstration that could not be made at the roll-out of these affiliate relationships.

With the above principles in mind, three of the requirements in section 274(b) merit comment:

1. Ownership of Common Property (Notice ¶¶ 41-42)

Section 274(b)(5)(B) provides that a BOC and its section 274 affiliate may not own property in common. The Commission concludes that this prohibits a BOC and its section 274 affiliate from jointly owning goods, facilities, physical space, and telecommunications transmission and switching facilities.<sup>38</sup> The Commission asks whether this provision prohibits a BOC and its section 274 affiliate from sharing

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<sup>37</sup> See 47 USC § 222(d)(3).

<sup>38</sup> Notice ¶ 41.



the use of property owned by one entity or the other and whether it prohibits them from jointly leasing property.<sup>39</sup>

Section 274(b) does not prohibit the BOC and its section 274 affiliate from engaging in commercial transactions between themselves. Section 274(b)(3) requires only that the transactions be conducted in a manner consistent with each company's operating independence (i.e., on an arm's-length basis) and that the transaction be in writing and made publicly available. If these requirements are satisfied, a BOC and its section 274 affiliate would be permitted to lease real and personal property from each other. They would also each be permitted to lease real property from a common landlord in the same building, if they are each responsible only for their own leasehold interest.

2. Equipment and Services (Notice ¶¶ 44-45)

Section 274(b)(7)(B) prohibits a BOC from purchasing, installing, or maintaining equipment on behalf of its section 274 affiliate, except for telephone service that it provides under tariff or contract. The Commission has requested comment about the type of "equipment" encompassed by this section.<sup>40</sup>

This section would prohibit a BOC from providing any depreciable equipment to be used by its section 274 affiliate in the conduct of the affiliate's business. However, this section does not prohibit a BOC from providing services to its section 274 affiliate operations.

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<sup>39</sup> Id. ¶ 42.

<sup>40</sup> Id. ¶ 45.